

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

CENOBIOS H. HERRERA, SR.,      } Case No. 2:23-cv-01162-DSF-JDE  
Petitioner,                        } AMENDED ORDER TO SHOW  
v.                                } CAUSE WHY THE PETITION  
WARDEN OF FCI LOMPOC,            } SHOULD NOT BE DISMISSED  
Respondent.                        }  
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I.

**INTRODUCTION**

On February 14, 2023, the Court received from Petitioner Cenobio H. Herrera, Sr. (Lanz) (“Petitioner”), a federal prisoner at the Federal Correctional Institution in Lompoc, California, proceeding pro se and without paying the required filing fee or seeking leave to proceed in forma pauperis, a one-page “Petition for a Writ of Habeas Corpus 28 U.S.C. § 2241,” seeking an order directing the Federal Bureau of Prisons (“BOP”) to “Apply My First Step Act Credits (“FSA”), Elderly Offender Credit, And Good Time Credits (“GTC”).” Dkt. 1 (“First Petition”). Petitioner was previously deemed a

1 vexatious litigant, and by prior order, is required to obtain a court order or  
2 written authorization to proceed with certain actions. See United States v.  
3 Herrera, et al., Case No. 2:02-cr-00531-RSWL (C.D. Cal.) (“Underlying  
4 Action”), Dkt. 447. The Petition has been referred to the undersigned  
5 magistrate judge for preliminary review and consideration.

6 On February 21, 2023, the Court issued an Order to Show Cause Why  
7 the First Petition should not be dismissed, directing Petitioner to respond in  
8 writing within 21 days. Dkt. 4 (“First Order”). Separately, on February 15,  
9 2023, the Court received a nearly identical version of the First Petition, with  
10 the name “Brian Birkholz” added after “Warden of FCI Lompoc” on the  
11 caption as Respondent, a new notation “Emergency Under Necessity” in the  
12 title, “[Nunc Pro Tunc]” added below the date, and two pages of largely  
13 illegible attachments, although the document was not added to the docket until  
14 February 23, 2023. Dkt. 5 (“Petition” or “Pet.”). The Court interprets the filing  
15 at Dkt. 5 as Petitioner’s intended operative Petition and the Court treats it as  
16 the operative Petition. As such, with Dkt. 5 as Petitioner’s operative Petition,  
17 the Court vacates the First Order, but instead replaces it with this Order.

18 A habeas petition brought under 28 U.S.C. § 2241 is subject to the same  
19 screening requirements that apply to habeas petitions brought under 28 U.S.C.  
20 § 2254. See Rules Governing Section 2254 Cases in the United States District  
21 Courts, 28 U.S.C. § 2254 (“Habeas Rules”), Habeas Rule 1(b) (providing that  
22 district courts may apply the Habeas Rules to habeas petitions that are not  
23 brought under § 2254); Lane v. Feather, 584 F. App’x 843, 843 (9th Cir. 2014)  
24 (affirming district court’s application of Habeas Rule 4 to dismiss a Section  
25 2241 petition). Accordingly, pursuant to Rule 4 of the Habeas Rules, the Court  
26 is required to “promptly examine” the Petition and, “[i]f it plainly appears  
27 from the petition and any attached exhibits that the petitioner is not entitled to  
28 relief,” the Court “must dismiss the petition.”

The undersigned has reviewed the Petition under Rule 4 of the Habeas Rules and finds the Petition is subject to dismissal for the reasons explained below.

II.

## PROCEDURAL HISTORY

In March 2003, following a jury trial, Petitioner was convicted of conspiracy to aid and abet manufacturing of methamphetamine and to possess pseudoephedrine knowing and having reasonable cause to believe it would be used to manufacture methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(C)(2), and 18 U.S.C. § 2; two counts of possession of pseudoephedrine knowing and having reasonable cause to believe it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(2); conspiracy to money launder, in violation of 18 U.S.C. §§ 1956(h), 1956(a)(1), and 1957; and several counts of laundering of monetary instruments, aiding and abetting, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 2. Underlying Action, Dkt. 130, 133, 182-183.<sup>1</sup> In December 2003, Petitioner was sentenced to 360 months of incarceration. Pet. at 1; Underlying Action, Dkt. 182-183. Petitioner appealed the judgment, which was affirmed in part and remanded in part by the Ninth Circuit Court of Appeals on January 23, 2007. United States v. Herrera, Case No. 04-50000 (9th Cir.), Dkt. 92. A petition for rehearing was denied on February 26, 2007. Id., Dkt. 100.

On August 28, 2009, Petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence. Underlying Action, Dkt. 341. On

<sup>1</sup> The Court takes judicial notice of the relevant federal records available electronically. See United States v. Raygoza-Garcia, 902 F.3d 994, 1001 (9th Cir. 2018) (“A court may take judicial notice of undisputed matters of public record, which may include court records available through [the Public Access to Court Electronic Records].”); Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2002) (taking judicial notice of opinion and briefs filed in another proceeding).

1 October 16, 2009, Petitioner voluntarily dismissed this motion, entered by the  
2 district court on December 23, 2009. Id., Dkt. 362, 372. Petitioner filed a  
3 second motion under Section 2255 on December 20, 2011, which was denied  
4 on January 17, 2013. Id., Dkt. 403, 412.

5 In July 2011, Petitioner filed a Section 2241 petition, which was  
6 dismissed because his claims were not cognizable in a federal habeas petition.  
7 See Herrera, Sr. v. Sanders, Case No. 2:11-cv-06196-RS WL-MAN (C.D. Cal.),  
8 Dkt. 1, 3-4. Less than a month later, Petitioner filed another habeas petition  
9 under Section 2241 challenging a restitution order. Herrera, Sr. v. Sanders,  
10 Case No. 2:11-cv-06486-RS WL-MAN (C.D. Cal.), Dkt. 1. That petition was  
11 dismissed with prejudice on October 1, 2012. Id., Dkt. 15. A third habeas  
12 petition under Section 2241 was “essentially a re-hash” of his first habeas  
13 petition and dismissed without prejudice on February 8, 2012. See Herrera, Sr.  
14 v. Sanders, 2:12-cv-00976-JSL-MAN (C.D. Cal.), Dkt. 1, 3, 4.

15 Meanwhile, on October 10, 2013, Petitioner was declared a vexatious  
16 litigant, with the District Judge finding Petitioner had an “extensive history of  
17 frivolous litigation” in the Underlying Action, raising “patently meritless  
18 positions.” Underlying Action, Dkt. 447 (“Vexatious Litigant Order”) at 6, 10,  
19 13-14. Under the Vexatious Litigant Order, Petitioner is prohibited from filing  
20 documents that:

21 (1) contest the jurisdiction of this Court over his conviction, (2) is a  
22 non-motion or contract-style filing such as, but not limited to, a  
23 Notice, Covenant, Warrant, Offer of Proof, Conditional  
24 Acceptance, Waiver of Tort, Presentment, Letter, Claim for  
25 Damage or Injury, or similar filings which reference tort claims,  
26 non-corporate status, debtors, interpleaders, damages, property  
27 claims, chattel, contracts, agents, principals, or rescission, or (3)  
28 without obtaining the prior approval of the Ninth Circuit Court of

1 Appeals, request relief which would be appropriately addressed  
2 pursuant to 28 U.S.C. § 2255.

3 Vexatious Litigant Order at 13-14. On July 28, 2014, the Ninth Circuit  
4 affirmed the Vexatious Litigant Order. Underlying Action, Dkt. 454.

5 Since that time, Petitioner has continued to seek release. For instance,  
6 on April 22, 2019, Petitioner filed a request for sentence reduction pursuant to  
7 18 U.S.C. § 3582(c)(1)(B) based on the First Step Act of 2018 and Amendment  
8 782 to the Sentencing Guidelines. Underlying Action, Dkt. 486. On July 29,  
9 2019, the district court denied the motion pursuant to the First Step Act (*id.*,  
10 Dkt. 492), and denied the motion as to Amendment 782 on October 10, 2019.  
11 *Id.*, Dkt. 502. On January 23, 2020, Petitioner filed another motion to reduce  
12 sentence pursuant to Section 3582(c), which was denied on April 24, 2020. *Id.*,  
13 Dkt. 511, 536. Petitioner, through counsel, filed a renewed motion for  
14 compassionate release on May 18, 2020, which was denied on August 10,  
15 2020. *Id.*, Dkt. 546, 557. That decision was affirmed by the Ninth Circuit on  
16 June 29, 2021. *Id.*, Dkt. 562. On March 4, 2022, Petitioner filed another  
17 motion to reduce sentence pursuant to the First Step Act and 18 U.S.C. § 3585,  
18 which was denied on May 9, 2022. *Id.*, Dkt. 570, 582. On October 12, 2022,  
19 Petitioner filed another motion for reduction of sentence in the Underlying  
20 Action, which was denied on February 7, 2023. *Id.*, Dkt. 595, 617.

21 On October 21, 2022, Petitioner filed another habeas petition under 28  
22 U.S.C. § 2241, seeking release on home confinement under the Coronavirus  
23 Aid, Relief, and Economic Security (CARES) Act, and asserting alleged  
24 failures to comply with an injunction in another action and inadequate medical  
25 care, which was dismissed on January 18, 2023. See Herrera, Sr. v. Birkholz,  
26 Case No. 2:22-cv-07784-RSWL-JDE (C.D. Cal.), Dkt. 10 (Report and  
27 Recommendation of Assigned Magistrate Judge recommending dismissal),  
28 Dkt. 11 (Order Accepting Report and Recommendation, dismissing action),

1 Dkt. 12 (Judgment of Dismissal). Petitioner also recently had a civil rights  
2 complaint dismissed. Herrera, Sr. v. US Attorney California-Central, Case No.  
3 2:22-cv-04245-GW-AGR (C.D. Cal.), Dkt. 18 (Order of Dismissal dated  
4 January 19, 2023).

5 As noted, the Court received the instant Petition on February 14, 2023.

6 **III.**

7 **SUMMARY OF THE PETITION**

8 In the one-page Petition, Petitioner appear to argue that the BOP  
9 wrongfully denied him certain credits toward early release under the First Step  
10 Act, the “Elderly Offender Credit” and “Good Time Credits” due to Petitioner  
11 having been found to be a “leader/organizer of criminal activity,” which  
12 Petitioner asserts, is a “made up policy of the BOP as [the First Step Act],  
13 Elderly Offender Credit and the [Good Time Credits] has no such rule within  
14 the statutes.” Pet. at 1. Petitioner also argues that the BOP is “reneging in  
15 accepting [his] officially given documents from the Department of Defense”  
16 which, Petitioner argues, recognize that he is a United States citizen as a result  
17 of his military service in combat, and asks the Court to “recognize” his status.  
18 In conclusion, Petitioner asks the Court to order the BOP “to apply [his] [First  
19 Step Act], Elder Offender Credits, [his] [Good Time Credits] as statutorily  
20 required, and the fact that the Department of Defense granted [his] full  
21 citizenship of the United States which [he] earned back in the year 1966, as  
22 was done officially.” Id.

23 **IV.**

24 **DISCUSSION**

25 A petition for writ of habeas corpus may lie under 28 U.S.C.  
26 § 2241(c)(3), subject to other limitations, if the petitioner “is in custody in  
27 violation of the Constitution or laws or treaties of the United States.” Here,  
28 Petitioner does not challenge the lawfulness of his underlying conviction or

1 sentence. Rather, Petitioner asks the Court to order the BOP to “apply” certain  
 2 credits to which Petitioner contends he is entitled. The Petition appears to  
 3 suffer from at least two defects.

4       First, Petitioner has not clearly set forth the grounds that plausibly  
 5 suggest entitlement to relief. Habeas Rules 2(c) and 4 require a statement of all  
 6 grounds for relief and the facts supporting each ground; the petition should  
 7 state facts that point to a real possibility of error and show the relationship of  
 8 the facts to the claim. See Habeas Rule 4, Advisory Committee Notes to 1976  
 9 Adoption; Mayle v. Felix, 545 U.S. 644, 655 (2005); O'Bremski v. Maass, 915  
 10 F.2d 418, 420 (9th Cir. 1990) (as amended). Allegations in a petition that are  
 11 vague, conclusory, palpably incredible, or unsupported by a statement of  
 12 specific facts, are insufficient to warrant relief, and are subject to summary  
 13 dismissal. See, e.g., Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995);  
 14 James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994); Hendricks v. Vasquez, 908 F.2d  
 15 490, 491 (9th Cir. 1990).

16       Here, the Petition asserts the BOP erroneously denied Petitioner certain  
 17 benefits under three alleged statutory or administrative schemes, that is, the  
 18 First Step Act, Elder Offender Credit, and Good Time Credits, based on the  
 19 BOP’s finding that Petitioner was an organizer or leader in his underlying  
 20 criminal conduct. But Petitioner does not describe the applicable programs, the  
 21 alleged denials of relief, or any proceedings that led to the alleged wrongful  
 22 denials of benefits. Indeed, to the extent Petitioner is seeking relief under the  
 23 First Step Act’s elderly offender reunification provision, as Petitioner has been  
 24 repeatedly advised, 34 U.S.C. § 60541(g) grants the Attorney General, not the  
 25 courts, discretion to release eligible elderly offenders, and as such, the Court  
 26 cannot grant relief under this statute. See, e.g., United States v. Herrera, 2022  
 27 WL 1488033, at \*2 (C.D. Cal. May 9, 2022) (explaining that “this statute does  
 28 not empower the Court to release [Petitioner] as an elderly offender”); United

1 States v. Herrera, 2019 WL 3428835, at \*1 (C.D. Cal. July 29, 2019)  
 2 (explaining that “the Court is not in a position to adjust his sentence or the  
 3 method of his imprisonment since the ‘statute merely grants the Attorney  
 4 General discretion to release eligible elderly offenders’”). Petitioner also claims  
 5 the BOP “reneg[ed] in accepting [his] officially given documents from the  
 6 Department of Defense, attached as exhibits, whereby [he is] fully recognized  
 7 as a United States citizen . . . .” However, the attachments are largely illegible  
 8 and Petitioner provides no explanation how this has “prevent[ed]” him from  
 9 receiving “the appropriate earned benefits.” The one-page Petition is wholly  
 10 conclusory and vague as to the bases for the alleged claims. As such, the  
 11 Petition is subject to dismissal.

12 Second, “[a]s a prudential matter, courts require that habeas petitioners  
 13 exhaust all available judicial and administrative remedies before seeking relief  
 14 under [28 U.S.C.] § 2241.” Ward v. Chavez, 678 F.3d 1042, 1045 (9th Cir.  
 15 2012). Exhaustion aids “judicial review by allowing the appropriate  
 16 development of a factual record in an expert forum; conserve[s] the court’s  
 17 time because of the possibility that the relief applied for may be granted at the  
 18 administrative level; and allow[s] the administrative agency an opportunity to  
 19 correct errors occurring in the course of administrative proceedings.” Ruvivat  
 20 v. Smith, 701 F.2d 844, 845 (9th Cir. 1983) (per curiam). As the requirement is  
 21 not a “jurisdictional prerequisite,” courts have discretion to waive the  
 22 requirement in Section 2241 cases. Ward, 678 F.3d at 1045 (citation omitted);  
 23 Laing v. Ashcroft, 370 F.3d 994, 998 (9th Cir. 2004). Courts may waive the  
 24 requirement where administrative remedies are inadequate or not efficacious,  
 25 pursuit would be futile, irreparable injury will result, or the administrative  
 26 proceedings would be void. See Ward, 678 F.3d at 1045; Laing, 370 F.3d at  
 27 1000.

28 Here, it appears from the face of the Petition that Petitioner has failed to

1 exhaust his administrative remedies as he argues that the exhaustion  
2 requirement is “no longer . . . a jurisdictional requirement in a 2241  
3 proceeding.” Pet. at 1. As set forth above, the Court agrees that exhaustion is  
4 not a jurisdictional prerequisite; nonetheless, the Court sees no reason to  
5 excuse exhaustion here as Petitioner does not allege that such remedies are  
6 inadequate or that requiring pursuit of administrative remedies would be futile,  
7 cause irreparable injury, or would be void. See Ward, 678 F.3d at 1045; Laing,  
8 370 F.3d at 1000. To the contrary, judicial review of Petitioner’s claims, based  
9 on three different administrative and/or statutory schemes (the First Step Act,  
10 the “Elderly Offender Credit,” and BOP Good Time Credits), would be aided  
11 “by allowing the appropriate development of a factual record in an expert  
12 forum; [would] conserve the court’s time because of the possibility that the  
13 relief applied for may be granted at the administrative level; and [would] allow  
14 the administrative agency an opportunity to correct errors in the course of  
15 administrative proceedings.” Ruviwat, 701 F.2d at 845. Other than noting  
16 exhaustion is not a jurisdictional prerequisite, Petitioner does not provide an  
17 explanation as to why the exhaustion requirement should be waived in this  
18 case. His cursory argument that “it is a BOP policy that Unit Team has said I  
19 cannot change, hence, administrative remedies is not available and no forms  
20 were given to me to grieve this policy” (Pet. at 1) lacks specific factual support  
21 and as such, is insufficient to demonstrate exhaustion would be futile here.  
22 Therefore, the Petition is subject to dismissal for failure to exhaust  
23 administrative remedies.

V.

## ORDER

26 For the foregoing reasons, the Petition is subject to dismissal. Petitioner  
27 is ORDERED TO SHOW CAUSE, in writing, by **no later than twenty-one**  
28 **(21) days from the date of this Order**, why this action should not be dismissed

1 under Habeas Rule 4 for the reasons stated above. To the extent Petitioner  
2 contends he has exhausted his administrative remedies, Petitioner is directed to  
3 provide information regarding his efforts to exhaust his claims and attach  
4 copies of any documents establishing that his claims are indeed exhausted. If  
5 Petitioner claims exhaustion of his administrative remedies should be waived,  
6 he shall set forth in detail the facts supporting this contention.

7 If, after review of this Order, Petitioner should decide not to further  
8 pursue this action at this time, Petitioner may voluntarily dismiss the action by  
9 filing a Notice of Dismissal in accordance with Federal Rule of Civil  
10 Procedure 41(a)(1). The Clerk is directed to send Petitioner a Central District  
11 Request for Dismissal form.

12 Petitioner is cautioned that a failure to respond timely in compliance  
13 with this Order could result in this action being dismissed for the foregoing  
14 reasons, for failure to prosecute, and for failure to comply with a Court order.  
15 See Fed. R. Civ. P. 41(b).

16 Dated: February 23, 2023

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18 JOHN D. EARLY  
United States Magistrate Judge

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